TO: THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION 2007

SUBMISSION FOR A SALARY DIFFERENTIAL FOR JUDGES OF COURTS OF APPEAL IN CANADA

Submitted
December 14, 2007

À : LA COMMISSION D'EXAMEN DE LA RÉMUNÉRATION DES JUGES 2007

MÉMOIRE POUR UN ÉCART DE RÉMUNÉRATION EN FAVEUR DES JUGES DES COURS D'APPEL DU CANADA

Soumis
Le 14 décembre 2007

SUBMISSION FOR A SALARY DIFFERENTIAL FOR JUDGES OF COURTS OF APPEAL IN CANADA

TO: THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION 2007

This submission, requesting a differential in salary between Appeal Court judges and Trial Court judges, is presented by 99 judges[1] of the Courts of Appeal in Canada.

JURISDICTION

A submission for a salary differential for Appeal Court judges was made in 2003 to the second Quadrennial Judicial Compensation and Benefits Commission (2003 Commission) by a majority of Appeal Court judges in Canada.

The 2003 Commission stated that the submission for a differential was "… a compelling submission …". However, it concluded that it lacked jurisdiction to deal with the merits of the request and that it was a matter which the Government ought to consider. Its view was expressed, in part, in these terms:

> This Commission's jurisdiction, as noted earlier, is prospective in nature and the recommendations we make must be confined to the considerations identified in s. 26(1) of the *Judges Act*. We are not permitted nor authorized to re-design the court system in Canada. If we were, it is entirely probable we would design a system where appellate court members received higher compensation than trial court members. Ignoring the economic considerations mandated by the statute, we are obliged to consider what steps ought to be taken to ensure judicial independence including financial security and to promote a high quality of candidates for appointment to judicial office. There is no foundation for the thesis that altering the historical situation of the court of appeal judges, from a compensation perspective, would have any impact whatsoever on those considerations. Accordingly, we are obliged, in our view, to refuse to recommend the proposal

[1] As of December 1, 2007, there are 142 judges of Courts of Appeal in Canada (Judicom).

> made on behalf of the members of the court of appeal for differentiation in the compensation they currently receive from that of trial judges. We believe, however, that the government ought to give consideration as to whether or not a different level of compensation might be appropriate for puisne judges who sit on courts of appeal.
>
> [underlining added]

No party ever contended that the Commission lacked jurisdiction to make a recommendation on the merits of a request for a salary differential.

The Appeal Court judges making the submission were, and are, of the view that the 2003 Commission erred in concluding that it did not have jurisdiction and that its failure to report on the merits of the request was an error in law. A number of them, through counsel, Mr. Roger Tassé Q.C., requested the Minister of Justice, in November 2004, to send the request back to the 2003 Commission pursuant to his powers under s. 26(4) of the *Judges Act*[2] and ask it for a recommendation on the merits. In a letter from the Deputy Minister of Justice, they were asked to wait until Parliament dealt with the then forthcoming Bill on judges' salaries before pursuing the issue of remitting the differential request to the 2003 Commission. It was not until December 14, 2006 that Parliament passed a Bill (C-17) with respect to the salaries of judges. The pending request for remitting the salary differential issue to the 2003 Commission under s. 26(4) of the *Judges Act* was then brought forward to the Minister of Justice. The request was still pending when the term of that Commission expired on August 31, 2007.

The ruling of the 2003 Commission on this issue is fundamentally incorrect on a question of law of a jurisdictional nature. The issue raised by the submission is one of remuneration and nothing more. A differential in compensation would not require a re-designing of the court system in Canada, but only a change in the remuneration of Appellate Court judges. The very purpose and mandate of a Commission is to inquire into the adequacy of the salaries of federally appointed judges. The question of a differential is clearly one that ought to be addressed on

[2] R.S.C. c. J-1.

its merits. It has been authoritatively settled by the Supreme Court of Canada (Supreme Court) that our Constitution mandates that all compensation issues relating to federally appointed judges be analyzed and processed by an independent body.[3] The Commission declined to do so on the ground of lack of jurisdiction. In our view, this is clearly an error which places the Appeal Court judges in an unjustifiably impossible position. On the one hand, the Commission states that it does not have the authority to address the question of a differential, and, on the other hand, Appellate Court judges cannot, in light of the judgments of the Supreme Court respecting the independence of the judiciary, raise and negotiate the issue with the Government.

It is precisely the task of the Commission, and not of the Government, to fully evaluate, on the merits, the submission for a salary differential.

Our position with respect to the jurisdiction of the Commission to deal with the merits of the request for a differential is supported by the Canadian Superior Courts Judges Association (Association) and the Canadian Judicial Council (C.J.C.). Furthermore, we are informed that the Government agrees with our contention regarding jurisdiction and will not contest our submission on that point.

THE MERITS OF THE REQUEST FOR A SALARY DIFFERENTIAL

The following is, in essence, what the 2003 Commission termed a "compelling submission", with certain refinements, additions and an updating of the statistical data, all of which, in our view, make this submission even more persuasive than the previous one. A very significant addition is our examination of the salary differential granted in the United Kingdom in 1974 to Appeal Court judges and thereafter continuously maintained.[4] We deal with it in detail further on.

[3] In compliance with this requirement, Parliament established the Judicial and Benefits Commission (S.C. 1998 c. 30 s. 5). The legislative provision is now found in s. 26 of the *Judges Act*, R.S. c. J-1.
[4] A brief reference was made to the situation in the United Kingdom in the Appeal Court judges final submission of March 26, 2004 (at p. 8). Since then, we have been able to obtain documents which explain the change.

BACKGROUND

In a *Report on Judicial Independence and Accountability in Canada*[5], prepared for the Canadian Judicial Council, Professor Martin L. Friedland recommends that Appeal Court judges be paid a higher salary than Trial Court judges:

> Similarly, in my opinion, **judges of courts of appeal should be paid somewhat more than judges in trial courts. This is the pattern in England and the United States and it should be adopted here**. A differential would have been difficult in the past when there was no distinction in function in some provinces between court of appeal and trial judges. Moreover, the distinction between court of appeal and superior court trial division judges was not as pronounced in the past – at least in terms of numbers – before the merger of county and distinct courts with superior courts. County and district courts no longer exist in Canada. (emphasis added) (p. 54).

After the publication of the Friedland Report, a submission was made by judges of the Quebec Court of Appeal to the 1995 Commission on Judges' Salaries and Benefits (1995 Commission). That Commission declined to consider the issue on its merits because it was received too late in the process, stating: “The submission, while welcome, simply came too late to be given the attention that this subject deserves".[6]

A submission for a salary differential was made to the 1999 Quadrennial Judicial Compensation and Benefits Commission (1999 Commission) by Appellate judges of six Courts of Appeal.

The 1999 Commission noted that they “regarded many of these arguments [in favour of a salary differential] as compelling”.[7] However, it deferred consideration of this matter pending receipt of further information. It undertook to consider the issue “in further detail should it be made the subject of a referral to us

[5] Martin L. Friedland, A Place Apart: Judicial Independence and Accountability in Canada, May 1995.

[6] 1995 Commission Report p. 30.
[7] 1999 Commission Report # 2.5 p. 51.

... within the term of our mandate".[8] The Government, the only party entitled by statute to refer issues to the Commission in between its regular four-year reviews, did not do so.

We, at the outset, referred to the 2003 Commission which concluded it did not have jurisdiction to deal with the merits of the submission for a differential presented to it.

Thus, in the result, the merits of previous requests for an appropriate salary differential have yet to be dealt with by a Commission.[9] We respectfully ask this Commission to recommend a salary differential for all full-time (including supernumerary) judges on Courts of Appeal in Canada in the amount equivalent to 6.7% of the salary paid to federally appointed Trial Court judges.

JUDICIAL HIERARCHY

A salary differential between Court of Appeal judges and Trial Court judges has been widely recognized in common law jurisdictions where a salary differential for appellate judges is typically the norm.

It is our submission that, in the end, there is one fundamental and compelling principle which, by itself, commands a salary differential. That principle is recognized in both the public and private sector in Canada and, indeed, the rest of the democratic world. It is one of the central organizing principles on which society remunerates individuals for the work they do.

With the notable exception of the remuneration paid to judges of Courts of Appeal, the principle of a salary differential exists for each court level in Canada. Supreme Court puisne judges are paid $47,800 (18.97%) more than other federally appointed puisne judges. Federally appointed Trial Court judges are paid more than provincially appointed judges. Provincially appointed judges are paid

[8] *Supra* p. 52.
[9] "Commission", when not otherwise defined, means a Commission on Judges' Salaries and Benefits.

more than justices of the peace. And Chief Justices and Associate Chief Justices of both Appellate and Trial Courts also receive increased remuneration in recognition of their additional and distinct responsibilities. However, judges on Courts of Appeal, are paid the same salary as federally appointed Trial Court judges.

It is noteworthy that when there were County Courts and District Courts, the judges were federally appointed and received a lesser salary than the other federally appointed Trial Court judges. In Ontario, for example, their salary was $6,500 less than that of the judges of the High Court.[10] Differentials have existed, and exist, throughout the federal system, except for the Appeal Court judges.

Judicial hierarchy recognizes the specific roles, duties and responsibilities assigned to each level of court. That judicial hierarchy is an essential element of the constitutional framework of our justice system.

The judicial structure in Canada consists of five levels with the proportion of cases of public importance increasing as one proceeds up the hierarchical ladder:

1. The Supreme Court of Canada.

2. The Appellate Courts in each Province and the Federal Court of Appeal.

3. The Federally appointed Trial Courts in each Province/Territory, the Federal Court and the Tax Court of Canada.

4. Provincial and Territorial Courts, and Masters.

5. Justices of Peace and Commissioners and their equivalents.

[10] In 1985, the judges of the County and District Courts in Ontario, Nova Scotia, British Columbia and Newfoundland received a salary of $82,600 while the judges of the High Court in Ontario and the equivalent level in the other aforementioned Provinces received a salary of $89,100, a differential of $6,500 (7.87%). The *Judges Act* 1985, R.S.C. ch. J-1, Sections 12, 14, 17, 21 and 23.

The real issue raised by this submission concerns the place occupied by judges of Courts of Appeal in the judicial hierarchy of this country and the attendant responsibilities imposed on them. Parliament and the Legislatures have established the various levels of courts and their relative rank in the judicial hierarchy. The higher the level of the court in the hierarchy of the Canadian judicial system, the greater the responsibility of the judges on that Court. This is illustrated in the binding or precedential impact of judgments rendered by Courts of Appeal on the lower Courts. There being a hierarchy of courts in the justice system the question is, what is the place of Courts of Appeal in that hierarchy? The answer is obvious. Courts of Appeal come immediately after the Supreme Court and occupy a rank between the highest Court in Canada and the Trial Courts.

The absence of a salary differential for Appeal judges is an historical anachronism arising from an era predating the creation of separate Courts of Appeal. In the past, only one superior Court was in existence with an appeal and a trial division and judges had a limited mobility between the two divisions of the same Court. Today, separate Courts of Appeal exist in every Province and Territory. However, exceptionally, in Prince Edward Island as well as in Newfoundland and Labrador, the Appeal Court is a division of the Supreme Court. In addition, Parliament, recognizing judicial hierarchy, has recently established the trial court called the Federal Court, and the Federal Court of Appeal. The decision by Parliament and the Legislatures to establish separate Courts of Appeal across Canada affirms the special place that these Courts now occupy in the judicial hierarchy.

Our judicial system ascribes a critical importance to the role played by Courts of Appeal, as set out in the principles enunciated by the Supreme Court. [11] Their role and responsibilities have undergone a significant change in the last two and one half decades. Given the limited rights of appeal to the Supreme Court, Courts of Appeal have, for all practical purposes, become the Courts of final resort in approximately 98% of the cases before them, with all the attendant

[11] *Housen* v. *Nikolaisen*, [2002] S.C.R. 245 at pp. 247-248.

responsibilities this imposes. They are called on to settle the law for the Province and to assure the observance of the principle of universality, which requires that the same legal rules are applied in similar situations. They play a significant role in the evolution and interpretation of the law. They have a recognized law-making role, and their judgments are authoritative, not only in their Province, but in some instances throughout Canada. They are also an error-correcting court. With increasing frequency, Courts of Appeal are called upon by Provincial Governments to hear References on the constitutional validity of complex, and sometimes controversial legislation.

In short, Courts of Appeal perform appellate functions comparable to those performed by the Supreme Court, albeit at a level in the judicial hierarchy just below that of the Supreme Court. The Supreme Court judges merit and receive a salary differential. For the same reasons, judges of Courts of Appeal merit and should be paid a differential salary given the comparative importance of their duties, responsibilities and position in the judicial system. We submit that this objective and relevant criterion should be given considerable weight in determining an appropriate salary differential.

The source of appointments to the Supreme Court underscores the significance of judicial hierarchy and its importance in the Canadian justice system; they are almost always made from Courts of Appeal. Of the last 23 appointments to the Supreme Court (1979-2007), two were from private practice while all the other 21 were judges of Appeal Courts. There is no case in recent history of a judge of first instance being named directly to the Supreme Court. This exemplifies the place occupied by the Appeal Courts, and its judges, in the judicial hierarchy.

Judicial hierarchy serves the public interest. It permits an examination of the judgments of lower courts, thereby enhancing public confidence in the administration of justice. The Commission is required under s. 26(1.1)(c) to consider "the need to attract outstanding candidates to the judiciary". Attracting the best possible candidates to Courts of Appeal is of great importance given that

Courts of Appeal are effectively courts of last resort for most cases in Canada. A salary differential could also provide an incentive to move up the judicial ladder. We submit there is no legitimate reason not to provide judges aspiring to Courts of Appeal the additional motivational incentive found in a salary differential.

The reason that salaries and benefits must be sufficiently competitive to attract the very best candidates to the Supreme Court applies with equal force to Courts of Appeal. This was recognized more than a decade ago by the Friedland Report[12] which recommended a salary differential for judges on Courts of Appeal in Canada. That is especially so with increasing burdens being placed on Courts of Appeal. This reason further compellingly demonstrates the rationale for a salary differential for Courts of Appeal. It is also a signal of the recognition for the office and role played by Appellate Court judges.

Equally important, salary differentials in recognition of hierarchy and associated roles and responsibilities exist in the civil service and the private sector. The invariable rule is that the higher up the hierarchical ladder, the greater the overall responsibility and, in turn, the greater the remuneration. We generally speak of judges being “promoted” or “elevated” to Courts of Appeal and to the Supreme Court. This accurately reflects the reality of the position of Appeal Courts in Canada’s judicial structure. It is only reasonable and fair that this different and higher position in the judicial hierarchy be accompanied, as in all other fields of human endeavour, by an increased salary after the promotion or elevation.

Amongst the objective and relevant criteria which should be considered under ss. 26(1) and (1.1)(d) is the public perspective. The public believes, and therefore accepts, that a salary differential is being paid in accordance with judicial hierarchy. As one of the Commissioners observed at the hearing of the 2003 Commission on February 4, 2004:

> … I think the majority, the vast majority of the public, of the people of Canada, are absolutely convinced that there is a differential

[12] Martin L. Friedland, A Place Apart: Judicial Independence and Accountability in Canada, May 1995, p. 54.

> remuneration between Trial Court judges and Appellate Court judges.[13]

This public perception is not surprising. The Canadian public doubtless expects a salary differential as one moves up the judicial hierarchical ladder. This is entirely consistent with practice in both the private and public sectors where those with a higher position and concomitant responsibilities receive increased benefits. This disjuncture between public perception and expectation, on the one hand, and the current reality, on the other, constitutes a further reason in support of a salary differential for judges of Courts of Appeal.

THE SALARY DIFFERENTIAL IN OTHER JURISDICTIONS

The salary differential which we request would bring Canada into line with other democracies, whose legal traditions are similar to ours, where a salary differential between judges of Trial Courts and judges of Courts of Appeal is the norm.

The adoption of a differential for Lord Justices of the Court of Appeal in the United Kingdom, which we referred to earlier, is instructive.

Until 1974 there was no differential in salaries paid to High Court Judges and Lord Justices of Appeal in the United Kingdom (U.K.). In 1971, the U.K. Government created the Review Body on Top Salaries (Review Body) with the mandate to recommend salaries, *inter alia*, for the judiciary. A special Committee of its members, under the Chairmanship of Lord Beeching, was charged with the preparation of a recommendation with respect to the judiciary. In a very detailed Report, the Advisory Group examined the entire judiciary, established categories and applied differentials throughout the system. The Committee recommended that a differential in salary be granted to Lord Justices of Appeal in comparison to salaries of High Court judges in England and Wales. The recommendation reads:

[13] Transcript of hearing p. 234.

Lord Justices of Appeal

> 27. The High Court Judge and the Lord Justice of Appeal have always been paid at the same salary level. They do different types of work, but exceptional intellectual qualities are called for in a Lord Justice of Appeal, and appointment to the Court of Appeal from the High Court Bench is regarded as a promotion. On the other hand, the Lord Justice of Appeal does not undertake Circuit work, with the attendant inconvenience which we have taken into account in assessing the High Court Judge. On balance, we consider a differential justified, in recognition of the promotion. However, we do not consider that it should be large, because the need for it is substantially offset by the absence of the inconvenience factor inherent in Circuit work.[14]

The Review Body in accepting the recommendation of the Advisory Group stated in its Report:

The Advisory Group's Report

> 83. […] In particular, it recommended that a differential should be established between the Lords Justices of Appeal and the High Court Judges, in recognition of the promotion which is involved in appointment to the Court of Appeal from the High Court Bench.[15]

Our views

> 93. […] In other respects too, we endorse the views of the Advisory Group, including the desirability of grouping a number of existing appointments for salary purposes, and of <u>according a differential to the Lords Justices of Appeal over the High Court Judges in England and Wales</u>.[16]
>
> [underlining added]

In the result, the High Court judges that year received £21,000 annually and the Lord Justices in Appeal £22,500, representing a differential of 7.14%.

A few years later in 1978, the Review Body[17] adopted the recommendation of a differential for Appeal Court judges in Northern Ireland and Scotland submitted

[14] From the *Review Body on Top Salaries*, Report n° 6, December 1974, Cmmd. 5846, Appendix E, para. 27, at 93.
[15] *Supra* note 10, c. 4 at 31.
[16] *Supra* note 10, c. 4 at 35.
[17] Review Body on Top Salaries, Report n° 10, June 1978, Cmmd. 7253.

by a Sub-Committee under the Chairmanship of Sir George Coldstream and stated, in this regard, with respect to Northern Ireland:

> 66. […] The Sub-Committee concluded, again on judicial grounds alone, that the Puisne Judge in Northern Ireland should be ranked with the High Court Judge in England and Wales, and that a differential should be created for the Lords Justices of Appeal in relation to the Puisne Judges, notwithstanding their interchangeability, in order to create a clear 'promotion' step from the High Court to the Court of Appeal. […]
>
> [underlining added]

The Report of the Sub-Committee in proposing the differential emphasized that being named to the Court of Appeal was a promotion and even though there was some interchangeability, a differential was warranted. Its view was expressed in these terms:

> *Lords Justices of Appeal*
>
> 29. Because of the extent of the interchangeability between the Puisne Judge and the Lord Justice of Appeal in Northern Ireland, the Advisory Group in 1972 did not follow the pattern that it set in England and Wales in creating a differential between the High Court Judge and the Appeal Court Judge. We have examined this matter afresh, and we are convinced that, while interchangeability is still an important factor, and is necessary to the efficient functioning of a small higher judiciary, it should not be allowed to override the fact that the move to the Appeal Court is a promotion and that it is now established practice (so we have been told) to appoint to the Appeal Court exclusively from the High Court. We consider that a differential is appropriate and that it should be the same as we have indicated for England and Wales.[18]
>
> [underlining added]

The Review Body adopted the same reasoning with respect to the judges in Scotland.

The U.K. Government accepted the recommendation of the Review Body and since 1978, Justices of Appeal in England, Wales, Northern Ireland and Scotland receive the same salary and all of them receive the same differential with respect to the salary paid to High Court judges.

[18] *Supra* note 14, appendix J.

This reasoning is all the more persuasive with respect to the situation in Canada, because, in fact, for all practical purposes, there is no interchangeability between the Appeal Courts and the Trial Courts.

_____

An examination of the salaries paid in jurisdictions, outside of Canada, discloses the following salary differentials for Appeal Court judges.

ENGLAND & WALES, SCOTLAND AND NORTHERN IRELAND

The salaries of puisne judges in England & Wales, Scotland and Northern Ireland are the following as at November 1, 2007:

HIGH COURT	COURT OF APPEAL	HOUSE OF LORDS
£165,900	£188,900	£198,700

Appeal Court judges are paid £23,000 (13.86%) more than the High Court judges. The Law Lords of the House of Lords are paid £32,800 (19.77%) more than judges of the High Court.

UNITED STATES

In the United States, the differences in the salaries between the puisne judges of the Courts in the federal system are as follows since 2006:

DISTRICT COURT (First Instance)	CIRCUIT COURTS (Courts of Appeal)	SUPREME COURT
(U.S.) $165,200	(U.S.) $175,100	(U.S.) $203,000

Appeal Court judges are paid $9,900 (5.99%) more than the District Court judges. The judges of the Supreme Court are paid $37,800 (22.88%) more than those of the District Court.

In the State Courts there is, without exception, a differential in salary between Trial Court and Appeal Court judges in all the States, whether the Appeal Court be a Court of last resort or an intermediate Appellate Court.

NEW ZEALAND

The salaries of puisne judges in New Zealand as of October 1, 2006 are the following:

HIGH COURT	COURT OF APPEAL	SUPREME COURT
$315,000	$340,000	$363,000

Appeal Court judges are paid $23,000 (6.33%) more than judges of the High Court and judges of the Supreme Court are paid $48,000 (15.23%) more than High Court judges.

QUANTUM

We are requesting a salary differential in the amount equivalent to 6.7% of the salary paid to Trial Court judges. At present, the difference in salary between Supreme Court judges and Trial Court judges is $47,800[19] or 18.97%. In our view, approximately 35% of this spread would, at the present time, adequately reflect the place of the Appeal Courts in the judicial hierarchy, being between the judges of the Supreme Court and federally appointed judges of Trial Courts.[20]

Since we do not know what salaries will be recommended by this Commission for the puisne judges of the Supreme Court and the puisne judges of Trial Courts, we express our request for a salary differential in percentage terms by asking for (6.7%) more than the salary paid to Trial Court judges, or, alternatively, as 35% of the difference between the Supreme Court judges' salaries and the Trial Court judges' salaries.

OTHER MATTERS

It would be appropriate, at this point, before concluding our submission, to respond to certain questions raised in the past, which may still be extant. We will not be dealing with matters which were previously raised as possible obstacles,

[19] Supreme Court judges receive $299,800/yr and Trial Court judges $252,000/yr.
[20] Based on present salaries, the amount of the differential would be $16,884.

but which now appear to have been abandoned, such as a possible constitutional effect on the Provinces because of s. 92(14) of the *Constitution Act 1867*.[21]

The 2003 Commission referred to the notion of those who view the granting of a differential as being divisive. We submit that there is no merit to the notion that a salary differential would be divisive. It has no empirical basis. Salary differentials already exist at every court level but one. There is no reason to believe that a salary differential for Courts of Appeal judges would lead to any less goodwill, respect, collegiality and interaction between judges of those Courts and judges of Trial Courts than presently exist amongst all judges at all court levels in Canada. Indeed most sat in the Trial Court prior to being appointed to the Appeal Court. Judges understand the structure of the system within which they work. How judges treat each other is not contingent on what each court level is paid. Nor should it be. Moreover, a certain institutional separation already necessarily exists between the two court levels in order to preserve the independence, impartiality and integrity of the appeal process.

It should be noted that the Government did not raise this notion before the 2003 Commission as a reason for opposing the submission for a salary differential. And rightly so. It is unreasonable that a fair and justified salary differential should be denied just because some judges disagree on the basis of a claimed, but undefined, divisiveness. Such a suggestion is tantamount to advocating that a wrong decision is warranted simply to avoid an alleged divisiveness.

In any event, this notion lacks any principled foundation. No one has advanced any rational reason why paying one level of judges an increased salary would create divisiveness. Judges on Courts of Appeal are not suggesting that they be paid an increased salary at the expense of a fair salary for judges of other Courts. Judges on each Court level should receive fair and justified compensation

[21] It is dealt with at p. 5 of the Appeal Court judges submission to the 2003 Commission dated December 8, 2003.

commensurate with their duties and responsibilities resulting from their place in the hierarchy within the judicial system.

It has been mentioned that there is a lack of unanimity amongst the Appeal Court judges in Canada. This, in our view, is of no significance. Unanimity in anything is not a reasonable expectation. A clear and significant majority of judges on Courts of Appeal have come forward publicly to support this submission and most were previously judges on the Trial Court. We respectfully submit that the submission meets the requirements of the *Judges Act* and should be granted.

We also wish to emphasize that simply because some Appeal Court judges did not publicly express a view does not mean that they oppose the request or are satisfied with the status quo. A large number of them, although in agreement with the submission, may prefer, for personal or professional reasons, not to take a public stand. The number of judges making this submission for a salary differential is substantial in its own right; moreover that number constitutes more than two thirds of the Courts of Appeal judges in Canada.

A persuasive indication of the inadequacy of the status quo is the fact that more than two thirds of Appeal Court judges, constituting a clear and significant majority, have come forward publicly to express dissatisfaction and ask that this Commission recommend a salary differential. Having regard to the general sense of reserve of judges in Canada, it is particularly noteworthy that such a large number of Appellate Court judges have foregone the comfort and security of anonymity to publicly take a stand in an effort to correct what is now an unfair and unjustified situation.

It has been suggested (not by the Government) that because Appeal Court judges sit in panels of three and have the advantage of mutual assistance, they should not receive a salary differential. This argument assumes that sitting alone is more difficult than sitting in panels. However, Appeal Court judges do the majority of their work alone both in terms of preparing for appeals and writing judgments.

More important, working with others is often demanding and stressful in its own right. And yet Appeal Court judges face this challenge daily as they seek consensus to provide the certainty the law requires for the better administration of justice. This is not an easy task. That is especially true today where appellate judges with different perspectives strive to resolve contentious and complex issues of principle and law that affect Canadian society as a whole.

Accordingly, it cannot be seriously contended that the size of a panel on a Court of Appeal should render a salary differential inappropriate. Moreover, if sitting on panels of three meant that Appeal Court judges should be deprived of a salary differential, what are we to say of Supreme Court judges who sit on panels of five, seven or now, most often, of nine? Clearly, the size of a court panel must be irrelevant in assessing what is otherwise a just and reasonable salary for Court of Appeal judges.

The 1999 Commission mentioned that comparative data relating to current workloads of trial and appellate courts could be explored. We consider it inappropriate to engage in a debate that may be seen as diminishing the value of the work performed by judges at any other court level. The relative importance of the work done by all judges in Canada, from the justices of the peace to the judges of the Supreme Court, is universally recognized.

Just as it would be unnecessary, and even unseemly, to suggest that Supreme Court judges must justify their salary differential on the basis that they work harder or accomplish tasks of more value than judges on Courts of Appeal, or that Trial Court judges must do the same to justify their salary differential vis-à-vis Provincial Court judges and masters, it is equally improper to impose this obligation on Court of Appeal judges. No such justification has ever been required in support of existing salary differentials amongst court levels in Canada. Members of Courts of Appeal should not be treated any differently. At the hearing before the 2003 Commission in February 2004, counsel for the Government agreed that a workload comparison was not appropriate.

CONCLUSION

The mandate of the 2007 Commission is to inquire into the adequacy of judges' salaries and benefits taking into account enumerated statutory criteria.

In that regard ss. 26(1) and (1.1) of the *Judges Act* provide:

26. (1) Est établie la Commission d'examen de la rémunération des juges chargée d'examiner la question de savoir si les traitements et autres prestations prévues par la présente loi, ainsi que de façon générale, les avantages pécuniaires consentis aux juges sont satisfaisants.	**26.** (1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judge's benefits generally.
(1.1) La Commission fait son examen en tenant compte des facteurs suivants:	(1.1) In conducting its inquiry, the Commission shall consider
a) l'état de l'économie au Canada, y compris le coût de la vie ainsi que la situation économique et financière globale du gouvernement;	*(a)* The prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
b) le rôle de la sécurité financière des juges dans la préservation de l'indépendance judiciaire;	*(b)* the role of financial security of the judiciary in ensuring judicial independence;
c) le besoin de recruter les meilleurs candidats pour la magistrature;	*(c)* the need to attract outstanding candidates to the judiciary; and
d) tout autre facteur objectif qu'elle considère pertinent.	*(d)* any other objective criteria that the Commission considers relevant.
[soulignements ajoutés]	[underlining added]

Given these statutory provisions, if a salary does not meet the test of being fair and justified, it is not an adequate salary. Thus, if it is fair and justified that judges on Courts of Appeal be paid a salary differential having regard to the enumerated criteria, then a recommendation for that purpose is required to meet the statutory objective of an adequate salary. In considering the adequacy of salaries for members of Courts of Appeal, ss. 26(1) and (1.1)(d) specifically call on the Commission to consider any other "objective criteria that the Commission considers relevant".

We have demonstrated with objective relevant criteria,[22] such as:

1) The present role and responsibilities of Courts of Appeal;
2) The rank of Courts of Appeal in the hierarchal structure of the judicial system;
3) The examination of judicial salaries in other comparable jurisdictions, and
4) The reference to prevailing conditions in other fields of endeavour in both the public and private sectors.

that the payment of a salary differential is required to achieve the legislative objective of an adequate salary for judges of Courts of Appeal.

Furthermore, a salary differential is warranted in order to attract the best of outstanding candidates to the Courts of Appeal.

_____

May it please this Commission to recommend, in its Report to be submitted to the Minister of Justice, that the full-time (including supernumerary) judges of Courts of Appeal in Canada be paid a differential whereby their salary would be in an amount of 6.7% higher than the salary paid to federally appointed judges of Trial Courts or alternatively higher by 35% of the difference between salaries of the Supreme Court puisne judges and federally appointed puisne judges of Trial Courts. The present percentage difference in salaries between the Chief Justices and puisne judges of the Appeal Courts should be maintained.

Respectfully submitted
December 14, 2007

Co-ordinating judge for this submission
Honourable Joseph R. Nuss, J.A.
Quebec Court of Appeal
Édifice Ernest-Cormier
100, Notre-Dame Street East, Rm. 2.48
Montreal, Quebec H2Y 4B6
(514) 393-2012 (514) 864-3130 (Fax)
jrnuss@judex.qc.ca

[22] Which satisfies the norm set out in ss. 26(1) and (1.1)(*d*).